Supreme Court, U.S.
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No. 96-17

In The

Supreme Court of the United States

October Term, 1996

NORTHROP GRUMMAN CORPORATION,

Petitioner,

v.

UNITED STATES ex rel. MICHAEL A. HYATT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a statutory amendment which is enacted while a lawsuit is pending, and which affects the jurisdictional authority of the trial court without affecting the substantive rights, duties and liabilities of the parties, is to be applied in keeping with this Court's decision in *Landgraf v. USI Film Products, et al.*, 522 U.S. 244 (1994).

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INTRODUCTION

In its Petition for Writ of Certiorari Northrop Grumman Corporation ("Northrop") requested the Court to consider its petition in conjunction with the petition in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340, wherein petitioner Hughes Aircraft had raised a number of issues concerning the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730, including the question of retroactivity raised herein by Northrop. On October 15, 1996, this Court granted certiorari in *Schumer* as to certain issues only, but did include the jurisdictional question of retroactivity. In light of this decision, the issue raised by petitioner Northrop is already before the Court and will no doubt be thoroughly briefed in the *Schumer* appeal. Nevertheless, sound authority supported the reasoning of the Ninth Circuit Court of Appeals decisions in both *Schumer* and in *United States ex rel. Hyatt v. Northrop Corporation*, 80 F.3d 1425 (9th Cir. 1996). As discussed below, the Ninth Circuit's rulings were entirely in keeping with this Court's decision in *Landgraf v. USI Film Products, et al.*, 511 U.S. 244 (1994). This conclusion, moreover, was the expressed opinion of the Solicitor General of the United States as set forth in the amicus brief filed in *Schumer* at the invitation of this Court.

ARGUMENT

I. THE POSITION OF THE UNITED STATES AS STATED IN *SCHUMER* SUPPORTS THE NINTH CIRCUIT'S RULING IN *HYATT* AS WELL.

At the close of its Petition for a Writ of Certiorari, Northrop Grumman Corporation ("Northrop") explicitly requested that its petition be considered in conjunction with that of the petitioner in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 116 S. Ct. 1845 (1996) (No. 95-1340). Consequently, the position asserted by the Solicitor General in the amicus brief for the United States filed in *Schumer* certainly should be considered in this context.

With respect to the retroactivity issue, the Solicitor General made three cogent arguments, all in favor of the propriety of the Ninth Circuit's reasoning in *Schumer* and, by implication, the decision in *Hyatt* as well.

First, the Solicitor General noted that both "the current Section 3730(e)(4) and its predecessor version have governed the jurisdiction of the district court rather than the substantive rights and obligations of the parties," and cited in support the decisions in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 551 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993); and *Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504, 506 & n. 9 (7th Cir. 1989), cert. denied, 494 U.S. 1025, 1026, 1027 (1990). Thus, it is the position of the United States, the real party in interest in any *qui tam* case under the False Claims Act, that the replacement of former Section 3730(b)(4) with current

Section 3730(e)(4), "neither prohibited previously lawful conduct nor increased the penalties for violations" and therefore "did not alter the existence or extent of petitioner's liability to the government," but rather "simply expanded the circumstances under which *qui tam* relators may file suit to enforce that liability." (Brief of United States, Amicus, in *Schumer*, 8)

As the Solicitor General pointed out, the reasoning of the Ninth Circuit in *Schumer* was entirely consistent with the principles stated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), wherein this Court had particularly noted that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed" (*id.* at 274), and where Justice Scalia further noted in his concurring opinion this Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction." *Ibid.* at 292. Because the amended provision governs the jurisdiction of the district court without altering the substantive rights, liabilities or duties of the defendant, the decision on retroactivity in both *Schumer* and *Hyatt* was manifestly in keeping with the principles stated in *Landgraf*, as the Solicitor General likewise concluded.

The Solicitor General's second argument in *Schumer* addressed one of the principal points also raised by petitioner Northrop herein, the purported "conflict" between the Sixth Circuit's decision in *United States v. TRW, Inc.*, 4 F.3d 417, 422-423 (6th Cir. 1993), cert. denied, 114 S. Ct. 1370 (1994), and the Ninth Circuit's approach to the retroactivity issue. The position of the United States, however,

is that there simply is not "an irreconcilable circuit conflict on this question," since *TRW* pre-dated this Court's decision in *Landgraf* such that there is no basis for concluding that Sixth Circuit, if called upon to reconsider the question, would adhere to its previous ruling. Significantly, the 1993 decision in *TRW* failed to even consider whether Section 3730(e)(4) was a jurisdictional provision, which was a consideration which, after *Landgraf*, played a significant role in the Ninth Circuit's decisions both in *Schumer* and here.

The Solicitor General's third and final argument on this score was an eminently practical one:

> The effective date of the statutory amendment at issue here is October 27, 1986. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. The longest statute of limitations under the FCA, including equitable tolling, is ten years. 31 U.S.C. § 3731(b)(2). As of October 27, 1996, new cases involving claims arising before the passage of the 1986 amendments will be barred by the statute of limitations. Even if a square circuit conflict existed, the question presented therefore is not of sufficient continuing importance to warrant this Court's review.

(Brief of United States, Amicus, in *Schumer*, 10)

In summary, the stated position of the United States on the retroactivity issue in *Schumer* is that the Ninth Circuit's approach is entirely in keeping with *Landgraf*, that the purported circuit conflict is of dubious significance and that even assuming such a conflict exists in the abstract, the inevitable operation of the applicable statute of limitations will, in a matter of days, render this dispute

largely an academic question in any event. Under these circumstances, the Solicitor General recommended denial of the petition in the *Schumer* action. Since petitioner herein specifically invited the Court to consider the then anticipated amicus brief by the Solicitor General in *Schumer* in the context of this petitioner, Northrop should not be heard to complain now that the position of the United States as articulated in the Solicitor General's brief squarely supports the decisions and reasoning of the Ninth Circuit in both *Schumer* and *Hyatt*.

II. THE NINTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *LANDGRAF*.

In *Landgraf* this Court cautioned that "deciding when a statute operates 'retroactively' is not always a simple or mechanical task. . . . A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 268-269 (citation omitted). Petitioner Northrop presents just such a simplistic mechanical analysis, and one which ignores both the fundamental reasoning of *Landgraf* and the particular features of *qui tam* litigation under the False Claims Act which bear directly on this analysis.

As petitioner Northrop is well aware, in any *qui tam* action under the FCA, the United States government is the real party in interest. See *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 50 (4th Cir. 1992). Indeed, one of the reasons the constitutionality of the 1986 amendments to the *qui tam*

provisions of the FCA was so hotly debated in the decade following enactment was because numerous defendants contended that a *qui tam* plaintiff lacked sufficient standing to pursue such civil prosecution. Over the years, however, federal courts at the trial court and appellate level articulated the relationship between the United States and a *qui tam* plaintiff as one between the real party in interest, the government and an authorized agent or assignee, the relator, whose standing to sue is granted by and at the discretion of Congress, but who serves in the capacity of one seeking redress for an injury done to the United States itself and not to the relator personally. See *United States ex rel. Kelly v. Boeing Company*, 9 F.3d 743, 747-749 (9th Cir. 1993).

The unique features of *qui tam* litigation simply cannot be ignored in the context of the retroactivity analysis without running afoul of this Court's statement in *Bradley v. School Board of Richmond*, 416 U.S. 696, 717 (1974) that the nature and identity of the parties, the nature of their rights and the nature of the impact of the change in law upon those rights must be addressed in the retroactivity context. *Landgraf* certainly did not overrule or undermine this earlier pronouncement in *Bradley*, but instead reaffirmed *Bradley's* essential holding that the law in effect at the time the court renders its decision must be applied unless to do so would result in "manifest injustice," in other words, unless such application would operate to affect the *substantive rights of the parties. Landgraf*, 511 U.S. at 278-279.

Landgraf clarified that a change in law has such a substantive effect where its application would "impair rights a party possessed when he acted, increase a party's

liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 522 U.S. at 280. The entire thrust of the reasoning in *Landgraf*, however, was the explicit distinction made between a genuine retroactive effect upon the *substantive* rights, liability or duties of a party, versus an effect which, though it is applied in a case involving conduct antedating the new law's enactment and may very well "upset expectations based in prior law" (*Landgraf*, 511 U.S. at 269) does not affect the substantive rights, liabilities or legal duties involved.

In applying this analysis in the *qui tam* context it is therefore necessary to bear in mind the actual status of relator. Quite simply, a *qui tam* plaintiff has no independent status as a party plaintiff apart from the circumscribed status conferred upon such relator by Congress to act on behalf of the United States government. See *Kelly*, *supra*, 9 F.3d at 748. It is the government's rights, as the real party in interest, which are at issue in any *qui tam* action, whether or not the United States formally intervenes to assume primary control of the litigation. Similarly, the liability in issue is the defendant's liability to the United States, not to the relator himself, just as the duties in question arising from past transactions are those from past transactions between the United States and the defendant, not from transactions between the defendant and the individual relator.

The clear lesson of *Landgraf* is that any change in law will, to some degree, upset expectations based in prior law. *Landgraf*, 511 U.S. at 269-270, n. 24. Consequently, it will always be possible to pose a simplistic and mechanical protest that the challenged law "attaches new legal

consequences" to events completed before the law's enactment. An analytical approach which starts with the broad generality that new legal consequences now attach to some kind of pre-enactment conduct, and which, without further analysis of whether truly substantive rights are involved, then leaps to the conclusion that therefore the new law *necessarily* has an impermissible retroactive effect is precisely the kind of reasoning rejected in *Landgraf* as simplistic and mechanical. It is ultimately a useless approach, since the premise applies so universally to all new enactments of law that the argument proves everything and nothing simultaneously. This is, however, the very analysis presented in Northrop's petition.

Northrop contends that the conduct in issue is "disclosure of information to the government" and that the "important legal consequence" of the amended provision is that whereas under prior law such disclosure preempted a *qui tam* action, now that is no longer necessarily so. (Pet. Br. 8-9) Then, without further ado, Northrop concludes that, "This analysis makes clear that the amended § 3730 would have a retroactive effect in the instant case." (Pet. Br. 9) Northrop therefore skirts entirely the critical question of what bearing the conduct it claims to be in issue, i.e., the relator's disclosure of information to the government, has upon the *substantive* rights, liabilities or duties of the actual parties, the United States and Northrop itself.

Respondent Hyatt submits that Northrop's failure to squarely address this central question is due to petitioner's apparent inability to overcome the cogent reasoning of the Ninth Circuit's ruling that there was no such

substantive effect here. Northrop attacks the Ninth Circuit's decision on two grounds, starting with the circuit court's conclusion that the amended law in no way altered Northrop's underlying liability. Petitioner contends that:

> This argument is flatly inconsistent with *Landgraf*, which makes clear that an alteration of the underlying substantive obligation is not the only way in which a statute may have a retroactive effect. Such an effect exists if application of the statute would 'impair rights a party possessed when he acted, increase a party's liability for past conduct, *or* impose new duties with respect to transactions already completed.' . . . Thus, even if the underlying obligation is not altered, a new statute will still have a retroactive effect if it increases a party's liability for past conduct or impairs a party's pre-existing rights.
>
> (Pet. Br. 10-11)

Northrop then argues that by "reviving a barred cause" a "complete defense" previously available to Northrop was eliminated "thereby impairing Northrop's pre-existing rights and increasing its liability." (Pet. Br. 11) In a footnote on the same page (fn. 5) Northrop contends that this result is "no less retroactive . . . than the revival of a claim barred by the defense of limitations" and then concludes that it was therefore deprived of a material defense which did more than merely resist the remedy, but actually disproved the action. (Pet. Br. 12, relying upon *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 301-02 (1913).)

In each particular of this argument, Northrop is flatly wrong. Contrary to Northrop's assertion, the Ninth Circuit clearly considered each of the three possible substantive areas set forth in *Landgraf*, including impairment of

any rights, the factor of increased liability and the possible imposition of new duties. *Hyatt*, 80 F.3d at 1428. Relying upon its earlier decisions, however, the *Hyatt* court ruled that the amended provision neither impaired any rights the defendant previously possessed, *nor* increased liability for past conduct, *nor* imposed any new duties upon defendant which it did not already bear. Furthermore, the Ninth Circuit specifically noted and relied upon its earlier decision in *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995) wherein it was held that the amendment does not "infringe on the substantive rights of the defendant." The Ninth Circuit likewise reiterated its explicit rejection of the argument that the amendment eliminated a material defense, as earlier stated in *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995). See *Hyatt*, 80 F.3d at 1429. Thus, any suggestion that the Ninth Circuit failed to consider these various issues and instead narrowly limited its review to the question of increased liability is readily disproved by reference to the Ninth Circuit's decision itself.

Additionally, however, it is apparent that in reaching its conclusions on these various matters, the Ninth Circuit followed, rather than departed from, the prescribed approach mandated by *Landgraf*. The Ninth Circuit's approach took into account the actual relationship between the real party in interest, the United States, the status of the relator vis-a-vis the United States, and the resulting relationship between the real party in interest's rights and the rights, duties, and possible liability of the defendant. It is this primary and fundamental analysis

which compelled the conclusions reached by the Ninth Circuit on these discrete issues.

Thus, the right of the United States to performance of contractual and other obligations free from fraud is established in 31 U.S.C. § 3729, and elsewhere in other statutory provisions but, *not* in the *qui tam* provisions of § 3730. Similarly, the liability of a defendant for fraud against the federal government arises from the substantive provisions of § 3729, not § 3730, just as the defendant's duties towards the government arise from contractual, statutory and regulatory contexts *other than* the procedural provisions of § 3730.

The United States furthermore has the right to designate those individuals who are authorized to act on its behalf, whether such individuals do so in the capacity of a Department of Justice attorney or as a private citizen whose authority is derived from a direct grant of standing by Congress. The defendant, however, simply has no "right" to choose whether its alleged wrongdoing will be addressed by one of the "regular troops" of the DOJ[1] versus a private citizen acting as a relator, any more than any defendant has a "right" to choose which of a number of specific government employed attorneys will be responsible for representing the government's interests in a given case. Consequently, because a defendant has no "right" to select between and among various individuals acting as agents for the United States, a provision such as 31 U.S.C. § 3730(e)(4) which alters or expands the pool of potential authorized agents in this regard simply does not

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[1] See *Milam, supra*, 961 F.2d at 49.

implicate a vested or substantive, right. Furthermore, no "material defense" which actually "disproved the right of action," was eliminated when Congress enlarged the pool of available individuals authorized to act on the government's behalf. A "material" defense disproves liability. The amendments to 31 U.S.C. § 3730 merely affected who might represent the government's interest, not what conduct was actionable.

Northrop's complete failure to address these issues head on necessarily infects its second attack on the Ninth Circuit's ruling. In essence, Northrop complains that the Ninth Circuit side-stepped the pertinent inquiry by holding that the amendments were jurisdictional in nature, without recognizing that "what matters under *Landgraf* is not whether Congress used the magic word 'jurisdiction'; what matters is whether the statute merely regulates the authority of particular courts or whether it also creates or destroys substantive rights." (Pet. Br. 14) This is indeed an ironic assertion, since the *Hyatt* decision and the line of authority preceding it dealt explicitly with the issue of whether any *substantive* right was affected by the amended law, while it is Northrop's own petition which is notably devoid of anything more than conclusory repetitions of the same arguments considered and rejected time and again in those thoughtfully reasoned appellate decisions.

The Ninth Circuit did not merely conclude, *ab initio*, that the provision was jurisdictional and that no further analysis was therefore necessary, but rather first concluded that no substantive rights, duties or liabilities were implicated and *therefore* concluded, as it had in

Schumer, that because no substantive interest was implicated, the normal "presumption that jurisdictional provisions will be applied retrospectively" had not been rebutted. *Hyatt*, 80 F.3d at 1429. This was not only generally in line with the approach expressed in *Landgraf*, but strictly in keeping with the very analysis mandated therein.[2] Thus neither of Petitioner Northrop's attacks upon the Ninth Circuit's reasoning withstand scrutiny.

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[2] Northrop's contention that the amendments to the FCA, unlike the Civil Rights Act, must stand or fall collectively on the retroactivity issue, rather than undergoing a discrete examination depending upon which provision is at issue, appears to be more of an afterthought than an argument. Apparently the only support for this position Northrop could find was in the papers filed in the case below by the government years ago and only shortly after the FCA was amended. Of course, the current position of the government is quite different, as is demonstrated by the recent amicus brief filed by the Solicitor General at the express invitation of this Court in the *Schumer* appeal. The approach of a section-by-section analysis need not be deemed a "per se" requirement in order for common sense alone to demonstrate that where different sections in fact implicate different concerns, some procedural, some substantive, an unthinking requirement that all provisions necessarily stand or fall together runs afoul of *Landgraf*'s essential precepts. Furthermore, in this instance there is nothing in either the statutory language overall or in the legislative history which suggests that Congress intended the retroactivity of any one subsection to determine that of all others. On the contrary, to the extent that any "compromise" can be discerned, it can be equally argued that the careful accommodations made *within* 31 U.S.C. § 3730(e)(4) represent Congress' balancing of the competing interests between expanded *qui tam* participation and the danger of parasitic suits which bring no new information to light, such that no further "compromise" need be judicially imposed.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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